

**UPPER ARKANSAS WATER
CONSERVANCY DISTRICT**

Water Activity Enterprise Committee

**August 12, 2021
10:00 A.M.**

The Upper Arkansas Water Conservancy District Water Activity Enterprise committee held its regular meeting Thursday, August 12, 2021 at the District offices, 339 East Hwy 50, Salida, Colorado, commencing at 10:00am, notice having been given by posting of Notice and Agenda on August 11, 2021, at the offices of the Upper Arkansas Water Conservancy District, 339 East Hwy 50, Salida, Colorado.

COMMITTEE MEMBERS PRESENT (IN PERSON)

Ralph L. (Terry) Scanga	Timothy C. Canterbury	Thomas Goodwin
Ken Baker	Tom French	Brett Mc Murry
Gregory W. Felt	Tony Telck	Richard Hilderbrand
	Tim Payne	Warren Diesslin
		Mannie Colon

COMMITTEE MEMBERS PRESENT (BY REMOTE VIDEO AND AUDIO CONFERENCING)

Mike Shields
Robert B. (Bill) Donley

COMMITTEE MEMBERS ABSENT

None

DISTRICT OFFICIALS/STAFF MEMBERS PRESENT (IN PERSON)

Kendall Burgemeister, Attorney	Jord Gertson, Hydrologist
Jennifer A. Scanga, Secretary	Chris Manera, Engineer
Gracy Goodwin, Projects Manager	Wendy Ryan, Engineer

DISTRICT OFFICIALS/STAFF MEMBERS PRESENT (BY REMOTE VIDEO AND AUDIO CONFERENCING)

Richard Brown, Legislative Consultant
Denise Sanchez, Office Manager

DISTRICT OFFICIALS/STAFF MEMBERS ABSENT

None

STATE OFFICIALS PRESENT

None

STATE OFFICIALS PRESENT (BY REMOTE VIDEO AND AUDIO CONFERENCING)

Will Scott, Water Commissioner, District 12
Dan Henrichs, Water Commissioner, District 11

STATE OFFICIALS ABSENT

Brian Sutton, Augmentation Coordinator
Bill Tyner, Division Engineer

GUESTS PRESENT

Tom Flower, Custer County Commissioner
Dave Schneider, District Manager, Round Mountain WSD

GUESTS PRESENT (BY REMOTE VIDEO AND AUDIO CONFERENCING)

Joe Stone, Heart of the Rockies Radio News
Alan E. Curtis, Attorney at White & Jankowski LLC
Cathy Garcia, Southern Colorado Regional Director for Congresswoman, Lauren Boebert

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Jim Blasing, Director of Pueblo West Utilities
Bob Hartzman, Canon City Water Superintendent

CHAIRMAN'S INTRODUCTION

Introduction of guests will be held over to the Board meeting.

MINUTES OF THE MEETING OF July 8, 2021

The minutes of the meeting of July 8, 2021, were approved upon motion by committee member Canterbury with second by committee member Hilderbrand.

TREASURER'S REPORT

Upon motion by committee member French with second by committee member Telck, the committee approved the financial reports dated July 30, 2021. Committee member Canterbury asked what year the District is in regarding the United States Geological Survey Water Balance Study Phase 2. Manager Scanga said that we are near the last payment. PM Goodwin explained that there was a time frame extension due to COVID and the last payment will be made in March, finalizing the study.

MANAGER'S REPORT – Terry Scanga

Manager Scanga introduced Attorney Alan E. Curtis of White & Jankowski LLC, representing John Cogswell, (Mr. Cogswell was not present). Atty Curtis joined the meeting via audio/video conferencing. Manager Scanga explained that John Cogswell purchased a piece of property in July 2020 which included 8.47 units (.847-acre feet) of augmentation for a pond on the property. The augmentation was purchased and approved in December of 2018. After Mr. Cogswell purchased the property with the augmentation plan in place, John Cogswell informed UAWCD that he no longer needed the pond augmentation and requested a refund of the purchase amount of \$32,609.50. Manager Scanga said that the district policy states that a purchaser has one year from the date of the application or until approval of the augmentation of the structure by the State Engineer/Division 2 Engineer to request and obtain a refund. Atty Burgemeister stated that Mr. Cogswell is requesting to transfer the augmentation back to the District or get permission from the District to transfer the augmentation to a third party to augment a new structure. Atty Burgemeister added that either a refund or consent to transfer to a new structure would be contrary to the augmentation policy and what is stated on the augmentation certificate. Atty Burgemeister said it has now come before the Board since it is a policy decision and is ultimately the prerogative of the Board to consider what John Cogswell and his attorney are proposing.

Chairman Canterbury asked what happened to the augmented structure? Atty Burgemeister answered that it is a pond that intercepts ground water and the state has made the determination that the structure was a pre-1981 gravel pit and does not require augmentation per the State statute.

Manager Scanga explained that when an individual contacts the District to acquire augmentation they have a choice of annual or a permanent plan, especially with a pond. He clarified that the pond in question exposes ground water and is therefore not eligible for an Annual Augmentation Plan. Manager Scanga said there are annual plans available for structures where diversions can be curtailed, or the pond lowered to eliminate evaporative loss and not injure water rights. He said that in this case the pond is not eligible for an annual plan and a permanent augmentation plan was purchased by the former owner of the property.

Manager Scanga further explained with permanent augmentation plans, the District sets aside enough water to cover all demands into the future. Therefore, a policy is in place that states that once it is approved, the District will no longer refund the augmentation purchase price. Manager Scanga said that if an individual decides to stop paying their annual storage and maintenance fee then the augmentation will be voided but the policy states no refund of the original purchase price for the augmentation water fee. He gave an example of a local pre-1972 subdivision where they have in-house use exempt wells. Manager Scanga stated that many of those owners have come to the District and purchased augmentation for outside watering. He said this causes the loss of the exempt well status and everything is then augmented. Manager Scanga further clarified that if an owner chooses to later sell the property and decides to go back to an exempt well status, the District will not refund the augmentation cost because the individual chooses to not irrigate outside any longer. He said it is analogous to the case in question.

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The District has put aside water for permanent augmentation purposes to create reliability. If the district allowed owners of structures with permanent augmentation to receive a refund, that could create an issue for the District with having invested in infrastructure without a revenue stream commitment. The purpose of this policy is meant to prohibit that from happening. Manager Scanga added that water is purchased for availability and reliability and this commitment is made to the consumer.

Atty Curtis stated why Mr. Cogswell wants to get approval to transfer the pond augmentation. He explained that in 2018 when the augmentation was approved, Mr. Cogswell was in the process of looking at a gravel pit exemption from the State. Mr. Cogswell did not have a temporary plan available because of the type of structure. He added that there is .847 acre-feet of water per year tied up in this pond. Atty Curtis said that with the assistance from Manager Scanga, Engineer Manera and Atty Burgemeister, Mr. Cogswell was able to obtain the gravel pit exemption. He stated that it was his understanding that the UAWCD was aware of the situation and it is the subject of an agreement between he and his client and the District. Atty Curtis said that the understanding from Mr. Cogswell's perspective was that once the gravel pit exemption was approved, the augmentation would not be required. He added that Mr. Cogswell is not proposing to not compensate the District but is suggesting that with an almost acre of water tied up in ponds that no longer require water, transferring the water to a willing buyer and putting the water to beneficial use as Colorado law requires is the best solution. He also added that Mr. Cogswell has continued to pay storage and maintenance fees for water not being used.

Atty Curtis stated that he would like the Board to consider Mr. Cogswell proposal. He said that Mr. Cogswell would like the Board to assist in the transfer of the augmentation to a third party and will compensate the Board for their time and efforts by agreeing to relinquish a percentage of the purchase price or refund back to the District.

Manager Scanga asked Mr. Curtis what type of structure Mr. Cogswell wants to transfer the augmentation to? Atty Curtis said he believes the transfer would be to ponds in the same area.

Director French asked if the existing pond contained any water? Atty Curtis said that it does but Division II Engineer Bill Tyner agreed to the gravel pit exemption and it took time to demonstrate that to the Division's satisfaction which is the reason it could not be dealt with within the one year mark under the District's policy. Mr. Curtis commented that Mr. Cogswell was between a rock and a hard place while waiting for the gravel pit exemption because if the exemption was approved, he would not have needed the pond augmentation.

Manager Scanga clarified for Mr. Curtis that the property/pond was not under Mr. Cogswell's ownership when the augmentation was purchased and approved. He added that the augmentation was appurtenant to that property. Manager Scanga stated that Mr. Cogswell was not between a rock and a hard place since he did not even own the pond or property when the augmentation was purchased and approved in December of 2018. A neighbor lady who shares the pond, was required by the State to purchase pond augmentation. It had nothing to do with Mr. Cogswell's appeal to Division II for a gravel pit exemption on his property. Mr. Cogswell did not own the property until 2020.

Atty Curtis stated that he was aware of that but being that it is 2021, it puts the augmentation beyond the 2018 certificate, and it is a function of having to deal with that exemption. He pointed out that due to various issues he was unable to reveal, the Yale Lake and surrounding ponds were given the exemption and Mr. Cogswell was not so he had to provide additional support and engineering before Engineer Tyner would approve the exemption. He said the issue is that the augmentation is no longer required, and it is almost an acre foot that someone else could put to beneficial use.

Manager Scanga clarified again that Mr. Cogswell has the option to not pay the Storage and Maintenance fee and have the Augmentation Certificate forfeited. He added that the water is not lost to the system. Mr. Curtis said he does not understand the thinking that says a person is allowed to hold an acre foot of water and not beneficially use it and pay a storage and maintenance fee that is not needed when there is a demand for water everywhere else.

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Chairman Canterbury expressed that he does not want to see the Board start allowing speculation on certificates when the District is not certain of the individual's intention. He said that if there was a solid plan and the District was fully aware of what the situation is then he might consider the proposal but he is not about to open the door for speculation. Chairman Canterbury added that the Board's duty is to meet obligations for augmentation and not have outside individuals dictating what the District needs to do. He said he would like the Board to think about it before deciding to consider Mr. Cogswell's proposal.

Atty Curtis explained that Mr. Cogswell has a user for the water and would like the Board to consider his proposal for a transfer of the augmentation. He added that he does not think it is speculating as Mr. Canterbury suggested because it would be a straight transfer where Mr. Cogswell will receive less money than what was paid for the Augmentation Certificate, and the District would receive a percentage of it. Atty Curtis stated that Mr. Cogswell has agreed not to sell the water for more than the original purchase price and therefore no profit to be made.

Manager Scanga asked Atty Curtis if Mr. Cogswell paid an extra \$32,000 for the augmentation when he purchased the property? Atty Curtis answered that yes, the certificate was reissued to him. Manager Scanga stated that was not the question and reiterated the question for Atty Curtis, asking if Mr. Cogswell paid an additional \$32,000 for the augmentation when he purchased the adjacent property or if he paid for only the value of the property? Atty Curtis was confused about the question and was never able to give a definite answer. Atty Curtis stated that Mr. Cogswell does not want to pay for something he is not getting in return. He said he is asking the Board to consider the proposal and if the answer is no, then there is no reason to proceed.

Manager Scanga suggested that Mr. Cogswell put together a proposal specifying all the details and bring it to the Board for review. He commented that at this point the Board has no idea of the specifics and what there is to consider. Director French made a motion to proceed with acquiring a detailed, written proposal from Mr. Cogswell. Director Payne seconded the motion.

Further discussion pursued and Director Payne stated that he would like to see a physical map of the area in question. Manager Scanga agreed and said he would like a more detailed proposal indicating the exact location and structure that Mr. Cogswell is asking to have the water transferred to. He explained that without knowing what it looks like, he would not want to consider the proposal.

Vice-Chairman Felt mentioned the possibility of going into an Executive Session to further discuss the legality of the situation. Director Payne suggested an Executive Session after the District receives the detailed, written proposal. Manager Scanga said he thinks before proceeding, a more specific proposal needs to be acquired as well as any ramifications to the District. Vice-Chairman Felt stated that if we allow those steps to happen then the District is acknowledging the willingness to consider the proposal but if we are not willing to consider it then there is no reason to pursue anything further.

Director Goodwin stated that his first reaction is to say no but agreed with Manager Scanga that we need a broader picture of what the proposal entails if the District decides to consider it. He added that he agreed also with Chairman Canterbury's speculation comment and that it sets a bad precedent in his mind though he is not opposed to a full proposal.

Director Hilderbrand stated that because it is such a unique request, he feels it would be setting a precedent if the District were to consider it.

Chairman Canterbury said that his first inclination is to say no and stated that he doesn't like the idea of a third party being able to supply augmentation to someone else and questioned whether there is a way the District could be left in charge of issuing the Augmentation Certificate and the third party compensate Mr. Cogswell in some manner? He added that he is adamantly against the idea if it would be opening a door to allow a third party to issue any type of augmentation that is the responsibility of the District.

Atty Curtis stated that what he and Mr. Cogswell are suggesting if the District agrees to consider the proposal, is that the District remain in control over the asset and Mr. Cogswell will abide by any

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requirements set by the District to deal with the issue. He added that it would be inappropriate for him to tell the District how to run their operations, he is only asking for approval with a process acceptable to the District.

Atty Burgemeister explained that how Chairman Canterbury stated it is exactly how it works. He said that Mr. Cogswell would not be an augmentation provider. He further explained that mechanically there are two ways to get to the same place and at the end of the day the only difference is who receives how much money. Atty Burgemeister said that for one, the District has no obligation to agree to anything. The certificate clearly states that it is not transferrable except to the subsequent owner of the structure to which the certificate was issued. If the District were to stick with that approach and Mr. Cogswell makes the decision to not pay storage and maintenance fees for augmentation he no longer needs, ultimately the certificate is cancelled and the third party that has a structure that needs augmentation can contact the District to purchase an acre foot of water again, and the District makes money on the value of the augmentation at the time of purchase. He continued explaining that at this point, there would be no water dedicated to Mr. Cogswell's structure and an acre foot of water would then be dedicated to the new structure and Mr. Cogswell would not gain any money from the third party. Atty Burgemeister further explained that in terms of the District's portfolio and augmentation on the stream and in terms of who is doing the augmentation and who is controlling and administering it, is still the District's and it is still the District's plan and everything stays the same. Atty Burgemeister added that it comes down to the question of; does the District make the money from cancellation and issuance of a new certificate or does the District make a reasonable fee for their time and effort of facilitating some type of transfer? He said that if the District agrees, at a minimum, it should be a process where the transfer is subject to the approval of the District and contingent upon that purchaser's structure being administered and allowed to be enrolled and approved by the State as a structure within the plan. Atty Burgemeister added that if the District were to go this route, he recommends not doing it as a one-time deal but setting a policy that states that the transfer of structures are subject to the above conditions and also subject to a specific fee, so that if someone proposes this in the future, the policy is consistent for everyone. Atty Burgemeister stressed that this is all presuming the Board makes the decision to change the policy to allow for transfers when the certificate is no longer needed.

Vice-Chairman Felt asked if the water is still being released to the structure? Manager Scanga explained that because of the District's accounting process, water is still being released. Chairman Canterbury clarified that once the commitment is made, water continues to be released until the commitment is null and void. Manager Scanga added that once it is off the records then no water will be released.

Vice-Chairman Felt asked the question of whether it is a beneficial use of water? Manager Scanga stated that it is fully consumable water. Atty Burgemeister stated that may be the primary policy question for the Board to think about and answer. He added that it is more of a policy question and not a legal question.

Director Payne expressed that it seems cleaner to end one certificate and start another as opposed to allowing an exception for the transfer of augmentation to a third party. Vice-Chairman Felt added that it is not like a stock certificate. Each certificate is very specific to the structure it is being used for and therefore it must come before the Board to get re-worked. Atty Burgemeister said it goes back to the mechanics of how it works and who is issuing and administering the certificate. He added that the bigger policy question which is whether to stick with the policy as written or change the policy to allow for what Mr. Cogswell has requested. He said there is a way to work the mechanics in a way that protects the District, but it is ultimately up to the Board.

Director Goodwin stated that after further discussion he feels that the Board has no responsibility whatsoever to make an adjustment for someone else. He explained that when a commitment is made between a purchaser and the District that said individual is making a commitment. It is the individual's choice to make that commitment. He added that once the commitment is no longer needed, to manipulate the system in order to get money back and trade with a third party in order to get money back in some other way is against policy and against the commitment made during the purchase. Director Goodwin adamantly expressed that he is not in favor of making any exceptions and if another individual wants to apply for a new augmentation commitment that is their choice and not the District's responsibility to

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deal with since it was a commitment made by the purchaser and a risk they elected to take. Atty Curtis stated that he does not disagree with a contract commitment but the issue is that the contract states that the District is to release .847 acre feet of water to the stream which is the beneficial use to be met by the UAWCD for that contract. He added that if the beneficial use does not exist anymore, then water is being released that is not being used by the District and that portion of the use has been abandoned. Atty Curtis expressed that he feels this situation is different than if someone says they do not want to augment anymore. The issue is that the use no longer exists due to the approval of the gravel pit exemption. He urged the Board to consider a policy that requires the District to deliver water not being used for beneficial use to the contract price and what it does to the District's portfolio in future abandonment proceedings.

Director Hilderbrand asked about the time frame from non-payment of Storage and Maintenance fees to time of forfeiture and when a new certificate can be reissued. Manager Scanga stated that there is a process and forfeiture does not happen immediately. He said that individuals are given many opportunities to make their payment and maintain in good standing with the contract. Manager Scanga added that a new certificate can be reissued immediately. He explained beneficial use by stating that the District releases water for structures (wells) that have been drilled but not yet in use. He said it is a good thing because the release of water over-augments the stream and is beneficial for the stream, recreation, the environment, and irrigation. Manager Scanga added that it is a fully consumable water right being put to beneficial use with no fear of abandonment.

Director Goodwin stated that after listening to the entire discussion he is not interested in moving forward with Mr. Cogswell's request.

Vice-Chairman Felt explained that there is a motion on the table to consider the proposal. He asked for the Board to vote whether to consider Mr. Cogswell's proposal and a policy change by a raise of hands. The proposal was unanimously denied.

Augmentation Report

Manager Scanga displayed the augmentation report for July 31, 2021. As of the end of July, total State approvals for augmentation were 724.81 acre-feet. Replacements for the month were 99.82 acre-feet including transit loss.

Manager Scanga provided a copy of a spreadsheet to Board members showing delinquent augmentation accounts and he stated that delinquent accounts make up for only 1.6% of total augmentation certificates. He explained that he is working on contacting individuals on the list giving them a final opportunity to come into compliance in accordance with their contract before forfeiture of their augmentation. Manager Scanga also provided the list for Board members to help contact individuals listed on the spreadsheet. He further explained that the delinquent accounts contain individuals who have failed to pay their Storage & Maintenance fee, submit a well meter reading with a photo, or both. He added that it is impossible to make correct replacements without an accurate meter reading and the photo provides more accuracy and verification. Mr. Scanga also stated that the District can provide a digital camera for individuals without a means of acquiring/taking a photo.

HYDROLOGIST REPORT

Reservoir Storage

Hydrologist Gertson reported that in our Twin Lakes account, we have 8.9 acre-feet of native water and 51.5 acre-feet of Twin Lakes, Transmountain water. Pueblo reservoir had 2903.4 acre-feet of project carryover and 599.0 acre-feet of project water. Total storage was at 5154.7 acre-feet. Director Hilderbrand asked about the IF & When account.

Manager Scanga explained that the District pays for a specific amount of space which is specified in the master contract of up to 1000-acre feet. He added that right now the District is only using 700-acre feet of space.

ENGINEER'S REPORT – Chris Manera, Colorado River Engineering

Deferred to next meeting

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LEGAL REPORT - Kendall Burgemeister, Law of the Rockies

Deferred to next meeting

OTHER BUSINESS

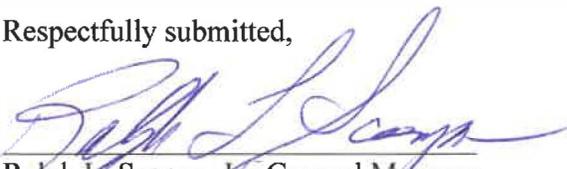
ADJOURN

No further business to come before the committee, the meeting adjourned at 11:19 pm

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Respectfully submitted,

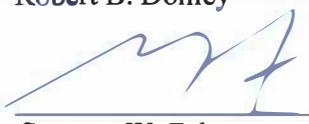

Ralph L. Scanga, Jr., General Manager


Ken Baker

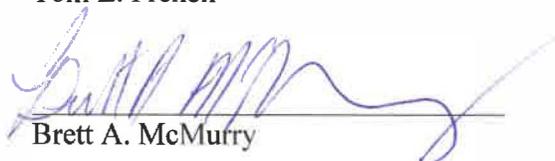

Timothy C. Canterbury

approved remotely - no signature
Mannie Colon

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Robert B. Donley


Gregory W. Felt

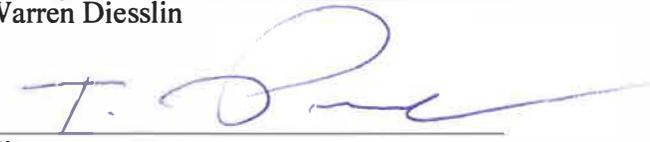

Tom E. French


Brett A. McMurry


Thomas Goodwin, Treasurer


Richard Hilderbrand


Warren Diesslin


Tim Payne


Tony Telck

approved remotely - no signature
Mike Shields